TAN GUAT LAN & ANOR

v.

AETNA UNIVERSAL INSURANCE SDN BHD

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI J
[SUIT NO: 22-43 OF 1998]
8 JANUARY 2003

INSURANCE: *Life insurance - Reinstatement of policy - Issue of incontestability - Requirement that life policy cannot be questioned after two years from date of which it is effected - Whether there was evidence of fraud - Insurance Act 1963, s. 15C(4) - Right to sue - Whether plaintiffs have "co-extensive right" - Failure to obtain leave or sanction of court - Whether action invalidated - Whether High Court prevented from hearing case involving subject matter of only RM100,000 - Whether defendant proved that non-disclosure was a material fact - Refund of premium paid - Whether proven by defendant - Whether plaintiffs estopped from making claim*

The plaintiffs are administrators of the estate of Lim Hee Hiung (LHH). LHH entered into a contract of insurance with the defendant wherein the defendant was to pay LHH's named beneficiary, Tan Guat Lan (the first plaintiff) the sum of RM100,000 ('the said sum') upon his death. The policy was issued on 2 May 1990 and was subsequently reinstated twice, the last reinstatement being on 14 February 1993 where LHH had signed a "declaration of good health." LHH died on 28 August 1993. However, the defendant refused to pay the said sum on the ground that LHH had failed to disclose to the defendant when he signed his second reinstatement policy his real state of health when he was actually suffering from "hypertensive/ischaemic heart disease." The plaintiffs filed the present action for specific performance of the policy and for the defendant to pay a sum of RM100,000 to the first plantiff.

The issues that arose were: (1) whether the insurance policy was incontestable; (2) whether the plaintiffs, as representatives of the estate of LHH, have the right to sue; (3) whether the plaintiffs require sanction of the court; (4) whether this was a fit and proper case for recovery on a policy of insurance in the High Court as the amount claimed was only RM100,000; (5) whether LHH had failed to disclose any material fact relating to his health condition and (6) does the acceptance by the first plaintiff the refund of premium pursuant to the avoidance of the policy for material non-disclosure as aforesaid result in the plaintiffs being estopped from making this claim.

Held:

[1] The computation of the two years period as stipulated in s. 15C(4) of the 1963 Act (as well as s. 147(4) of the 1996 Act) should start from the original date the policy was first issued and affected ie 2 May 1990 and not from the date of the last reinstatement on 14 February 1993. LHH's death was on 28 August 1993 and the claim was filed after that date. The two years period had expired and the defendant should be precluded from contesting the validity of the policy on the ground of false and non-disclosure of material facts unless fraud was alleged. There was no evidence of fraud adduced here. Therefore the defendant was not entitled to have the benefit of the second limb of the said s. 15C(4). (pp 390 c & 391 d)

[2] A "co-extensive" right is one which may be exercised by either party ie both LHH and Tan Guat Lan may sue. LHH's right to sue the defendant is absolute as LHH is a party to the contract of insurance whereas Tan's right to sue would be available only if certain condition-precedents are present. In the event of LHH's death, the administrators of his estate may proceed to sue on behalf of the estate. In practice Tan would only sue in her own name (as beneficiary) if LHH's administrators refused or neglected to sue on her behalf to recover the money. (pp 394 f-i & 395 a)

[3] Leave or sanction of the court is not a *sine quo non* for the filing of the present action. Leave is only applied for by the administrators if they wish to be sure that they will be indemnified by the estate as to costs. Failure to obtain the leave or sanction will not invalidate the action. (p 395 b-c)

[4] The plaintiffs' claim for specific performance and defendant's claim for declaratory relief are reliefs only available in the High Court. Further, the High Court is a court of unlimited jurisdiction. There is nothing to prevent the High Court from hearing a case involving a subject matter of RM100,000. (p 395 g-i)

[5] The burden was on the defendant to prove that LHH knew that he was suffering from "hypertension/ischaemic heart disease" at the time he signed the relevant document. One cannot fail to disclose something that one was unaware of. There was no evidence to show that LHH ever knew he had "ischaemic heart disease." It was also unclear whether he contracted that disease before or after 14 February 1993. Both the medical doctors who testified did not mention any "ischaemic heart disease" nor was there any attempt to explain what "ischaemic heart disease" is. The allegations in

the defendants' pleadings are not proven. Furthermore, the defendant has failed to prove that LHH has failed to disclose any material fact relating to his health condition in the relevant documents to the policy. (p 397 a-g)

[6] Regarding the cheque for the sum of RM2,368.21 received by Tan, the first plaintiff gave evidence that she was told that the payment was an advance payment involving her husband's death. She was not told that the payment was a refund for the premium paid. She had also returned the money to the defendant without spending it but the defendant refused to accept it. In view of the claims made by the first plaintiff, if the defendant intended to deny it, they should have called a representative from City Adjusters and Investigators Sdn Bhd or Sivamorthy himself (the Indian gentleman who had given the cheque) to rebut those claims. They did not. Therefore the first plaintiff's testimony stands unrebutted and must be accepted. Furthermore the failure on the defendant's part to call the said witnesses attracted an adverse presumption under s. 114(g) of the Evidence Act against the defendant. (pp 398 f-h & 399 a-b)

[7] The defendant was not entitled to contest or to avoid the said policy under s. 15C(4) of the Insurance Act 1963 (which was in force at the relevant time) so the question of the defendant refunding the said premium on the ground of material non-disclosure does not arise. The plaintiffs have, on the balance of probabilities, proved their claim against the defendant. (p 399 c)

[Plaintiffs' claim allowed with costs.]

Case(s) referred to:

Bank Bumiputra Malaysia Bhd v. Mohamed Salleh [2000] 2 CLJ 13 CA ***(refd)***

Cheong Bee v. China Insurance Co Ltd [1974] 1 MLJ 203 HC ***(refd)***

Emar Sdn Bhd v. Aidigi Sdn Bhd & Another Appeal [1992] 2 MLJ 734 SC ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125 HC ***(refd)***

LEG Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***

Leong Kum Whay & Anor v. American International Assurance Co Ltd [1999] 5 CLJ 11 HC ***(refd)***

Life Insurance Corporation of India [1962] AIR 814 ***(refd)***

Malaysian Assurance Alliance Bhd v. Chong Nyuk Lan [2003] 5 CLJ 245 HC ***(refd)***

Malaysian Australian Finance Co Ltd v. The Law Union and Rock Insurance Co Ltd [1972] 2 MLJ 10 HC ***(refd)***

Mithoolal v. Life Insurance Corporation of India [1962] AIR 814 ***(refd)***

Pacific & Orient Insurance Co Sdn Bhd v. R Karthivelu [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251 SC ***(refd)***

State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 23
Evidence Act 1950, s. 114(g)
Insurance Act 1996, s. 147(4)
Insurance Act 1963, s. 15C(4)

Insurance Act 1938 [India], s. 45

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 17, p 793, para 1560

For the plaintiffs - Francis JL Tan; M/s Rosni, Francis Tan & Ho
For the defendant - Dato' Bastian Pius Vendorgon; M/s Vendorgon & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:
The plaintiffs are administrators of the estate of Lim Hee Hiung ("LHH"). During his lifetime ie, on 30 April 1990 LHH entered into a contract of insurance with the defendant. It is a life insurance policy wherein the defendant was to pay LHH's named beneficiary the sum of RM100,000 upon LHH's death. LHH named his wife Tan Guat Lan (the 1st plaintiff) as his beneficiary in that policy. The said policy was first issued on 2 May 1990. After that the policy was reinstated twice ie, on 8 May 1991 and 14 February 1993. On both occasions LHH has signed a "Declaration of Good Health". LHH died on 28 August 1993 (ie, within one year period from the date of the second reinstatement on 14 February 1993). Both the plaintiffs took out letters of administration of LHH's estate and proceeded with their claim against the defendant. The defendant failed and refused to pay the RM100,000, as demanded by the plaintiffs on the ground that LHH has failed to disclose to the defendant on 14 February 1993 (when he signed the "Declaration of Good Health" for the second reinstatement of the policy) his real state of health and had declared that he was healthy whereas he was suffering from "hypertensive/ischaemic heart disease."

The plaintiffs filed the present action for specific performance of the policy and for the defendant to pay a sum of RM100,000 together with interest to the said Tan Guat Lan (the named beneficiary in the policy) and costs.

On the other hand, the defendant filed its counter-claim for a declaration that the said policy was null and void on the ground that LHH has failed to disclose that he was suffering from "hypertensive/ischaemic heart disease" in the relevant form for reinstatement on 14 February 1993. The defendant also prayed for a

declaration that the sum RM2,368.21 (being premium paid by LHH for the reinstatement of the policy) was effectively refunded to the said Tan Guat Lan.

There are various issues raised during the trial by both parties, namely:

i) Is the insurance policy in the present case, incontestable?;

ii) Whether a policy of insurance, is vitiated if there is a material non-disclosure of a fact, and therefore does LHH's non-disclosure of the fact that he suffered from hypertensive/ischoemic heart disease, a material non-disclosure and entitle the defendant to avoid the policy?;

iii) Do the plaintiffs, as representatives of the estate of LHH (deceased) have the right to sue in the present case or whether the plaintiffs require sanction of the court;

iv) Does the acceptance by the 1st plaintiff the refund of premium pursuant to the avoidance of the policy for material non-disclosure as aforesaid result in the plaintiffs being estopped from making this claim?;

v) Is this a fit and proper case for recovery on a policy of insurance in the sessions court as the amount claimed is only RM100,000?.

I shall now deal with the issues raised.

Issue of Incontestability

The plaintiffs argued that the said policy is incontestable on the ground of a non-disclosure of material fact in the proposal form under s. 147(4) of the Insurance Act 1996, after the expiry of two years period from the date of the policy when it was first issued on 2 May 1990. The defendant, on the other hand, relaying on the "incontestability and suicide provisions" in the policy itself claimed the two years period for incontestability should run "from the date of issue or reinstatement of the policy whichever is later." In other words, the defendant is saying that since the last reinstatement of the policy was made on 14 February 1993 and LHH's death on 28 August 1993, the two years period to invoke the incontestability provisions should start from the date of the last reinstatement (14 February 1993), not the date when the policy was first issued on 2 May 1990. The defendant also argued that s. 147(4) of the Insurance Act 1996 is not applicable to the present case because the said 1996 Act only came into force on 1 January 1997 whereas the insured (LHH) died on 28 August 1993. The defendant further argued that the Insurance Law on that date was governed by the Insurance Act 1963 (Act 89) which has been repealed by the Insurance Act 1996.

The court agrees with the defendant that the relevant laws governing insurance matter at the time of LHH's death was the Insurance Act 1993 (Act 89). The Insurance Act 1996 only came into force on 1 January 1997, and it does not provide for retrospective application. Therefore the provisions of s. 147(4) of the 1996 Act as quoted by the plaintiffs, are not applicable to the facts of the present case. However, that is not the end of the matter as far as this issue is concerned. The court has to see what were the relevant provisions in the 1963 Act which may have the same effect as s. 147(4) of the 1996 Act.

Prior to the 1996 Act, there was the Insurance Act 1963, but even that legislation was amended initially with s. 15C(4) wherein the contestability refers to the time which the policy was issued or reinstated by the insurer and the period was for three years. That was subsequently re-amended and to take effect from 1 April 1978 wherein the earlier reference to time of issuance was deleted and replaced with the phrase 'the time the policy was affected'. And that was maintained by the 1996 Act in s. 147(4). Having perused both the present s. 147(4) in the 1996 Act and s. 15C(4) of the 1963 Act, I am convinced that both the sections are in *pari materia* and having the same effect on the issue in question – relating to when the two years period should start.

Section 15C(4) of the 1963 Act reads:

> No life policy effected before the commencement of this section shall, after the expiry of two years from such commencement, and no life policy effected after the commencement of this section shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in a report of a doctor, referee, or any person, or in a document leading to the issue of the policy, was inaccurate or false unless the insurer shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policy holder with the knowledge that the statement was false or that it suppressed a material fact.

The two years period under s. 15C(4) of the 1963 Act should run from the date on which the said policy was affected. The question is: When is a policy said to be affected? In the case of reinstatement of the policy as in the present case when is the policy said to be affected? Is it from the time of the original issuance of the policy on 2 May 1990, or at the time it was last reinstated on 14 February 1993. If it starts from the time of the original issuance of the policy on 2 May 1990, then the two years period clearly had lapsed when LHH died on 28 August 1993 and s. 15C(4) is applicable ie, the policy is incontestable unless the defendant as an insurer shows that the alleged non-disclosure relates to material facts and it was fraudulently made by LHH

as the insured. If, on the other hand, the two years period starts from the date when the policy was last reinstated on 14 February 1993 then the two years period had not lapsed when LHH died on 28 August 1993, therefore, the incontestability provisions under s. 15C(4) of the 1963 Act is not applicable and the policy may be contested by the defendant on the ground of non-disclosure, without having to prove any element of fraud.

Having perused all the materials before me and having considered the respective contentions by both parties as well as all the relevant authorities cited, I am of the view that the computation of the two years period as stipulate in s. 15C(4) of the 1963 Act (as well as s. 147(4) of the 1996 Act) should start from the original date the policy was first issued and affected ie, 2 May 1990 in the present case, and not from the date of the last reinstatement on 14 February 1993. The decision of the Indian Supreme Court in *Mithoolal v. Life Insurance Corporation of India* [1962] AIR 814 and the decision of our High Court in *Leong Kum Whay & Anor v. American International Assurance Ltd* [1999] 5 CLJ 11 and *Malaysian Assurance Alliance Bhd v. Chong Nyuk Lan (Administrator of the Estate of Liew Kin On, deceased)* [2003] 5 CLJ 245, clearly support my view.

In the case of *Mithoolal*, the Indian Supreme Court was considering s. 45 of the Indian Insurance Act 1938 (which is in *pari materia* with s. 15C(4) of our 1963 Act) and stated:

> Whether the revival of a lapsed policy a new contract or not for other purposes, it is clear from the wording of the operative part of s. 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected ... .

Similarly in the case of *Leong Kum Whay* it was held by Mohd Noor Ahmad J (now JCA) that for the first insurance policy the computation of the two years period for the purpose of the reamended s. 15C(4) of the 1963 Act should be from the original date it was first effected.

His Lordship held there that:

> The first policy was effected on 9 August 1989 and the accident happened on 26 June 1993, that is to say, the two-year requirement under the section had expired. Hence, it is caught by the section. Under the section, the first policy cannot be called in question by the defendant on the ground that the statement made in the proposal for insurance was inaccurate or false unless the defendant shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the first plaintiff with the knowledge that the statement was false or that it suppressed a material fact. To my mind the defendant failed to prove the required

ingredients as I have stated in para 4 above, the first policy is valid and therefore, the defendant cannot avoid its liabilities under it.

Very recently, in the case of *Chong Nyuk Lan*, Richard Malanjum J (now JCA), in interpreting s. 147(4) of the 1996 Act (which is in *pari materia* with s. 15C(4) of the 1963 Act in relation to the two years period) has followed the earlier decisions and stated:

Having given serious consideration to the opposing contentions of learned counsel for the parties, I am inclined to accept the position of the law as regards s. 147(4) of the Act as interpreted in *Mithoolal* and that is to say that the computation of the two years period should start from the time the policy was originally effected regardless of lapse or renewal of the said policy

In the present case, the policy was first affected on 2 May 1990 and LHH died on 28 August 1993 and the claim was filed after that date. The two years period has definitely expired and the defendant should be precluded from contesting the validity of the policy on the ground of false and non-disclosure of material facts unless fraud is alleged. There is no evidence of fraud adduced in the present case. Therefore, the defendant is not entitled to have the benefit of the second limb of the said s. 15C(4).

For the foregoing reason alone, the plaintiff's claim should be allowed with costs.

The defendant is saying that the two years period as provided under cl. 1 of the general provisions of the said policy, should start from the date of the last reinstatement ie, 14 February 1993. The incontestability clause under cl. 1 provides:

Incontestability: - This policy (excluding all supplementary rider contracts attached to the Policy) shall be incontestable except for non-payment of premium, after it had been in force during the life time of the Insured for a period of two years from the date of issue or r**einstatement of this policy, which ever is later**.

The defendant also relied on the Declaration of Good Health (D6 and D7) submitted by the LHH for the purpose of reinstatement of the policy which say:

I further agree that if the policy be reinstated or issued the Incontestability and Suicide Provisions thereof shall be deemed and held and so modified as to have effect from the date of this certificate instead of the original issue date of the policy.

These contractual incontestability provisions do not contain the proviso or exception as provided under s. 15C(4) of the 1963 Act. However, it contained a part stating that the period of two years will run from the date of reinstatement of the policy (if there is a reinstatement).

The words used in those documents as well as the policy, clearly show that it affects only the contractual incontestability provisions. It does not affect the statutory incontestability provisions provided under s. 15C(4) of the 1963 Act (which was applicable to the present case). Section 15C(4) or any other relevant provisions of the Insurance Act was not even mentioned in the said documents. The insured need not rely on the contractual incontestability provisions as he is adequately protected by the statutory incontestability provisions under the Act. In any event, one cannot contract out of an Act of Parliament. The relevant s. 15C(4) was not worded so as to be "subject to any contrary agreement or modification by the parties." Therefore the defendant cannot agree with the Insured (LHH) to overide s. 15C(4). Any such agreement would be void and unenforceable as being contrary to public policy. In the case of *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125, Edgar Joseph Jr J (as he then was) held the following:

> In any event, any attempt to contract out of clear statutory provisions would be void and wholly ineffective as being contrary to public policy. Condition 12 must be read in the same light.

Section 15C(4) can only be defeated by proof of fraudulent suppression or omission of material facts. There is no suggestion in the pleadings or at trial of any fraudulent suppression of material facts. Fraud must be specifically pleaded and proved (see: *LEG Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473).

Right To Sue

The learned counsel for the defendant contended that from the documents tendered, the beneficiary under the policy is Tan Guat Lan (the 1st plaintiff); and as such the proceeds (if were to be paid) are payable to the 1st plaintiff pursuant to s. 23 of the Civil Act 1956 and therefore the action ought to have been commenced by the 1st plaintiff as a beneficiary, and not by the administrators. Further, the learned counsel for the defendant also contended that as the action is commenced by the administrators (personal representatives) of the estate of LHH (deceased) leave of court is necessary to ascertain the burden of costs. In the present case, the learned counsel submitted that the plaintiffs neither produced the consent of the 1st plaintiff (as a beneficiary) nor leave of the court to commence this action.

It is trite that a party to a contract may sue to enforce his own contract. That is beyond doubt. Therefore, the right of LHH to sue on this contract of insurance is very clear. If Tan Guat Lan (the 1st plaintiff) had sued in her own name (as a beneficiary) to recover the RM100,000, the issue would have been less clear as the absence of privity of contract and lack of consideration by her would plague her case. However, this issue does not concern us now as Tan Guat Lan does not sue in her own name here. She sues together with Tan Guat Hong as co-administrators of the estate of LHH.

The following cases would be able to show why the present action was brought by LHH's administrators and the problem that would have arisen had Tan Guat Lan chosen to sue in her own right as a beneficiary.

First, in the case of *Emar Sdn Bhd (Under Receivership) v. Aidigi Sdn Bhd & Another Appeal* [1992] 2 MLJ 734, Edgar Joseph Jr J stated in his judgment the following.

> Seventy-seven yeas ago, Viscount Haldane LC speaking for the House of Lords in the celebrated case of *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* said this at p. 853:
>
> > My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.

In the case of *Malaysian Australian Finance Co Ltd v. The Law Union and Rock Insurance Co Ltd* [1972] 2 MLJ 10, Azmi J (as he then was) held the following:

> Even if the applicant is a stranger to the contract of insurance and therefore cannot ordinarily sue on the basis of it, this general rule of law is not absolute and is subject to some exceptions which are definite and recognised. One of these exceptions is where there is a direct agreement to pay to or the respondent constitutes itself as the agent of the third party. This particular exception is illustrated at page 282 of *Sanjiva Row's Commentaries on Indian Contract Act and Law Relating to Tenders*, 6th Edition, Volume 1, where the writer said:
>
> > Yet another exception to the general rule is afforded where the promisor, between whom and the stranger no privity exists, creates privity by his personally agreeing with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally.

The other exception is where a trust is created which is illustrated by *Sanjiva Row* at p. 278 as follows:

> A third party who is to be benefited under a contract between A and B acquires equitable rights *ex contractu* if the agreement between the parties is so framed as to make one of them a trustee for the third party. In *Gandy v. Gandy* [1885] 30 Ch D 57 at 67, Cotton LJ. put the matter thus: "If the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial interest as *cestui que* trust under that contract; then B would, in a Court of Equity, be allowed to insist upon and enforce the contract."

> In the present case, because of the fact that the respondent has taken upon itself in the relevant endorsement to pay the applicant direct in respect of money arising to be paid under the policy, and the fact that the insurance policy was in fact effected for the applicant's benefit, the respondent should be regarded as trustee and/or agent for the applicant ... .

> Under the circumstances, it is my finding that the applicant has rights co-extensive as the said insured Choong Kok Hin in instituting claims in its own name against the respondent arising out of loss of the subject matter, upon which coverage was provided by the respondent by virtue of the endorsement dated June 29, 1968 appearing in the insurance policy.

Thus from the above two authorities, the law appears to be that where A contracts with B to pay C on the happening of an event, the general rule is that only A may sue and C who is not a party to the contract may not sue on the contract; but if there is an agreement that B should pay direct to C or a trust has been created for C, then C may sue to enforce the contract and in such event, the right to sue between A and C are "co-extensive". A "co-extensive" right is one which may be exercised by either party ie, both LHH and Tan Guat Lan (in the present case) may sue. Furthermore, in the case of *Bank Bumiputra Malaysia Bhd v. Mohamed Salleh* [2000] 2 CLJ 13, the Court of Appeal held that:

> Where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.

Thus, LHH's right to sue the defendant is absolute as LHH is a party to the contract of insurance whereas Tan Guat Lan's right to sue would be available only if certain condition-precendents are present. Needless to say, it is desirable that LHH sues instead of Tan Guat Lan. If LHH had died, then the administrators of his estate may proceed to sue on behalf of the estate. In practice Tan Guat Lan would only sue in her own name (as a beneficiary) if

LHH's administrators refused or neglected to sue on her behalf to recover the money.

Leave/Sanction To Bring Proceedings

The defendant submitted that the plaintiffs, as administrators of the estate of LHH require leave or sanction of the court to bring the present suit. With respect, I cannot agree with this argument. In law, leave or sanction of court is not a *sine quo non* for the filing of the present action. Leave is only applied for by the administrators if they wish to be sure that they will be indemnified by the estate as to costs. Failure to obtain the leave or sanction obviously will not invalidate the action. In *Halsbury's Laws of England*, 4th edn, vol. 17, p. 793, para 1560, it is stated that:

> It is advisable for a personal representative before bringing or defending an action to obtain the consent of all the beneficiaries on whom the burden of costs would ultimately fall or, if for any reason this is not forthcoming, to seek the court's directions by originating summons. If the beneficiaries' consent or the court's sanction is not thus obtained, the personal representative litigates at his own risk as to costs in the sense that he may be deprived of his right to be indemnified out of the estate if the court considers that he acted unreasonably in prosecuting or defending the action.

Sessions Court Or High Court

The defendant also argued that the present suit ought to be brought in the sessions court, not in the High Court as the value of the plaintiffs' claim is only RM100,000.

Looking at the notes of proceedings, I noticed that the defendant had earlier applied at trial (before His Lordship Dato' Hishamuddin) for this case to be transferred to the sessions court. That application was dismissed by His Lordship. There is no appeal made by the defendant against the said ruling. Therefore this issue is settled and need not be considered again at this stage of the proceedings.

In any event, in the present suit, the plaintiffs had claimed for specific performance whereas the defendant had counter-claimed for a declatory relief. Both these reliefs are available only in the High Court. Further, the High Court is a court of unlimited jurisdiction. Just because a RM100,000, suit is within the jurisdiction of the sessions court, it does not mean that the High Court has no jurisdiction to hear it. There is nothing to prevent the High Court from hearing a case involving a subject matter of RM100,000. This case has been heard in full by the High Court, therefore there is no question of transferring it to the sessions court.

Non-Disclosure By The Insured

The defendant's substantive defence appears to be limited to para. 4.3 of the statement of defence. It basically says that LHH as insured had failed to disclose to the defendant on 14 February 1993 his real state of health and had declared that he was healthy whereas he was suffering from "Hypertensive/ lschaemic Heart Disease." At trial, the defendant appeared to also allege as part of their arguments that LHH had failed to disclose his hypertensive condition in the proposal form (exh. D5), in particular, that LHH had not ticked the column "Yes" in Question 20(b) of the proposal form.

Exhibit D5 (Policy Information Form) is the defendant's standard form. Part 11 of the form clearly shows that the question to be answered in the form will depend on whether it is a "Medical Case" or a "Non-Medical Case". According to the form, for "Medical Case", questions 18 to 25 need not be answered. Exhibit D5 does not state whether the case involving LHH was a medical case or not. No evidence was led by the defendant to explain why the relevant boxes in Part 11 were not ticked. There was also no evidence emanating from the defendant at trial that can show that this case was a "Non-Medical Case". In fact, there is no evidence to show what is the difference between a "Medical Case" and a "Non-Medical Case". In fact, the defendant's insurance agent named in exh. D5 was not even called to give evidence at all. What did she tell LHH?. Did she propose to LHH a "Medical Case" or a "Non-Medical Case"?. LHH is dead. The said insurance agent should have been called by the defendant to explain this. The plaintiff had given ample notice of this issue to the defendant (see: plaintiffs' reply and defence to counterclaim, para 2.4 on p. 14 of the bundle of pleadings). In the circumstances, I am of the view that the rule of *"contra proferentum"* is applicable and Part 11 of the proposal as in exh. D5 should be construed against the defendant. (See: *Pacific & Orient Insurance Co Sdn Bhd v. R Karthivelu* [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251). That being the case, the case in the proposal should be construed as a "medical case" and as such questions 18 to 25 are redundant and need not be answered by LHH. Therefore, there can be no non-disclosure to a question which need not be answered in the first place. The matters covered by questions 18 to 25 are not to be considered as material. Therefore there is no question of non-disclosure of material facts. The "Declaration of Good Health" dated 14 February 1993 made by LHH for the purpose of the last reinstatement of the policy clearly shows that LHH was not making a fresh declaration that he was healthy, but had declared that he was in "as good health as when he signed" the earlier proposal form (exh. D5) and that his health "had not changed". Therefore, for the purpose of determining the issue of non-disclosure as alleged by the defendant, it must relate to the status of the earlier proposal form (as in exh. D5).

The burden to prove non-disclosure by LHH lies with the defendant. The defendant need to prove that LHH had hypertension at the time he signed the proposal from (exh. D5) on 30 April 1990. In this respect the evidence of Dr A Rajadurai of Reddy Clinic (DW1) is not relevant at all as the clinic first saw LHH on 17 March 1993 ie, after the proposal form (exh. D5) was signed. In fact, it is even after the date of the last declaration of health (exh. D7) was signed on 14 February 1993. The evidence of Dr Charban Singh (DW2) is inconclusive when he said (at p. 37 of the notes of proceedings):

> I've seen him 3-4 times a year. At other time, he must have been seen by the doctors. To assess the medical condition, would have to do further assessment and test on him, which I am afraid was not done, because the patient was not very keen.

The said witness (DW2) also said at p. 39 of the notes of proceeding that:

> Stress, exercise and lack of sleep may cause High Blood Pressure also. White-coat high blood pressure, should not elevate high blood pressure.

"White-coat high blood pressure" according to DW2 describes the phenomenon where, for some people, their blood pressure goes high every time it is measured by a doctor (thus the phrase "white coat"). If the blood pressured is measured by someone else, the pressure falls back. This is a phenomenon recognised by the medical circle.

Furthermore, the defendant's pleadings talked about "Hypertension/lschaemic Heart Diseases". The burden is on the defendant to prove that LHH knew that he had "Hypertension/ Ischaemic Heart Disease" at the time he signed the relevant document. One cannot fail to disclose something that one is unaware of. These is no evidence to show that LHH ever knew he had "Ischaemic heart disease". It is also unclear whether he got that disease (if at all) before or after 14 February 1993. Both the medical doctors who gave evidene (DW1 and DW2) did not mention any "Ischaemic heart disease" nor was there any attempt to explain what "Ischaemic heart disease" is, let alone linking "hypertension" to "Ischaemic heart disease". In the premises, the allegations in the defendant's pleadings are not proven. Parties are bound by their pleadings. (See: *State Government of Perak v. Muniandy* [1986] 1 MLJ 490).

The insurance companies have massive resources including lawyers to advise them and help them draft documents and the burden ought to be placed on them, to ensure that there can be no ambiguity or doubt in the documents. It is common knowledge that the ordinary person who applies for a policy or a reinstatement of a policy has no say in the wordings of the standard documents that he is asked to sign. These documents are prepared by the Insurers and

only they decide what words to use and what conditions to be put down in writing. Therefore, given those situations if what was put down in writing is ambiguous, it is only right that the other party (the insured) be given the benefit of the doubt. Thus in the present case, if there is a doubt or ambiguity in the policy or in the declaration of health form, it should be resolved in favour of the plaintiffs. In the case of *Cheong Bee v. China Insurance Co Ltd* [1974] 1 MLJ 203, the late Hashim Yeop Sani J (as he then was) stated the following:

> I am mindful of *Tan Kwang Chin v. Public Prosecutor* [1959] MLJ 253 where the learned judge referred to the judgment in *Edwards v. Griffiths* [1953] 1 WLR 1199, 1203 wherein it is stated that "if there is an ambiguity or a doubt as to the extent of the Policy, we should have to construe it in favour of the assured, that is to say, if the question arose as to the liability of the insurers, we should have to put on the Policy the construction most favourable to the assured and the less favourable construction to the insurers.

In the premise, the court is of the view that the defendant has failed to prove that LHH has failed to disclose any material fact relating to his health condition in the relevant documents to the policy.

Refund Of Premium

The defendant alleged that an amount of RM2,368.21 as premium paid by LHH on reinstatement of the policy on 14 February 1993 was refunded and accepted by the 1st plaintiff pursuant to the avoidance of the policy for material non-disclosure as aforesaid, and therefore the plaintiffs are estopped from making the present claim.

The evidence show that sometime in July or August 1996, an Indian gentleman approached the 1st plaintiff and gave her a cheque for the sum of RM2368.21. At that time letters of administration of the estate of LHH had not been granted. Letters of administration was granted to both the plaintiffs on 10 September 1998. Therefore, the 1st plaintiff accepted the cheque not on behalf of LHH's estate. Her action cannot in any way bind LHH's estate. In any event, the 1st plaintiff gave evidence that she was told by the Indian gentleman that the payment was an advance payment involving her husband's death and the balance will be paid later (see: pp. 7-9 of the notes of proceedings). She was not told that the payment was a refund for the premium paid. She also said that she did not spend the said money and after consulting a lawyer, she had returned the money to the defendant but the defendant had refused to accept it. The witness for the defendant (DW4) told the court that she did not witness the incident when the Indian gentleman handed the cheque to the 1st plaintiff and the said cheque was delivered to the 1st plaintiff by City Adjusters and Investigators Sdn Bhd through their staff named Sivamorthy. In view of the

claims made by the 1st plaintiff, if the defendant intended to deny those claims, they should have called a representative from City Adjusters and Investigators Sdn Bhd or Mr Sivamorthy himself to rebut those claims. They did not. Therefore, the 1st plaintiff's testimony stands unrebutted and thus must be accepted. Furthermore, the failure on the part of the defendant to call the said witnesses attracts on adverse presumption under s. 114(g) of the Evidence Act against the defendant.

In any event, as has been concluded earlier that the defendant is not entitled to contest or to avoid the said policy under s. 15C(4) of the Insurance Act 1963 (which was in force at the relevant times) the question of the Defendant refunding the said premium on the ground of material non-disclosure does not arise.

Findings On The Plaintiffs' Claim

On the above considerations, I am of the opinion that the plaintiffs have, on the balance of probabilities, proved their claim against the defendant. It is therefore my judgment that the plaintiffs' claim be allowed with costs and order as prayed in the statement of claim is hereby granted.

The Defendant's Counter-Claim

The defendant's counter-claim is grounded on the same premise as that of the statement of defence ie, that the said policy was invalid for non-disclosure of material fact when the said policy was reinstated on 14 February 1993 as stated in para. 2 of the counterclaim. Therefore, the defendant's counter-claim in this case is redundant. It is merely a defence to the plaintiff's claim In any event, by reason of the above, the counter-claim ought to be dismissed with costs.